

## (a) Themes of institutional autonomy in international law

# 8 The emergence of international agencies in the global administrative space

Autonomous actors or state servants?

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### Introduction

Related to the development of ‘global governance’<sup>1</sup> and ‘global administrative law’,<sup>2</sup> one may witness a process of ‘agencification’ at the global level. Indeed, apart from – or perhaps related to – the proliferation of international organizations,<sup>3</sup> a relatively new development is the proliferation of international bodies that are not based on an international agreement but on a decision by an international organization. It is not unusual for these bodies to exercise public law functions. According to some observers – and depending on definitions – the new international entities may even outnumber the conventional organizations.<sup>4</sup> The tendency towards functional specialization because of the technical expertise required in many areas may be a reason for the proliferation of such bodies and for their interaction with other international organizations and agencies, which sometimes leads to the creation of common bodies. International (regulatory) cooperation is often conducted between these non-conventional international bodies.<sup>5</sup> Whereas traditional international organizations are established by an agreement between states, in which their control over the organization and the division of powers is laid down,<sup>6</sup> the link between newly created international bodies and the states that established the parent organization is less clear. As one observer holds, this ‘demonstrates how the entity’s will does not simply express the sum of the member states’ positions, but reformulates them at a higher level of complexity, assigning decision-making power to different subjects, especially to the international institutions that promoted the establishment of the new organization’.<sup>7</sup>

The aim of the present contribution is to identify the nature of these bodies, referred to by us as ‘international agencies’, by attempting to define them on the basis of possible common characteristics. At the same time, our purpose is

to establish the role of these bodies in normative and regulatory processes taking place within the framework of international organizations. Answers to these questions will, finally, allow us to establish to what extent international agencies operate on the basis of a certain autonomy in the global administrative space. We will, first of all, attempt to define what we mean by ‘international agencies’. Next, we will, seek to establish the degree of autonomy of international agencies. Finally, our – tentative – conclusions on the consequences of the emergence of international agencies for the development of the global administrative space will be presented.

## **Defining international agencies**

### ***The establishment of international agencies***

Law-making and regulation are increasingly recognized as international phenomena.<sup>8</sup> Moreover, it is not entirely uncommon for international organizations to establish bodies with public law functions. Since these bodies are usually not based on a treaty, they do not qualify as international organizations themselves.<sup>9</sup> A first possibility is that these bodies are set up by one organization only, to help attain the objectives of that organization. The most well known examples include the institutions established by the UN General Assembly (such as UNCTAD, UNEP, UNIDO, UNCHS, UNFPA and UNDP). These bodies are usually referred to as ‘subsidiary organs’,<sup>10</sup> or as ‘quasi autonomous bodies’ (QABs).<sup>11</sup> Special bodies were also set up by the UN ‘Specialized Agencies’ and other UN-related organizations.<sup>12</sup> A case in point is the Al Qaeda and Taliban Sanctions Committee, a subsidiary organ of the UN Security Council, with its – well known – competence to place an individual on the consolidated list of terrorist suspects.<sup>13</sup>

A second group of bodies is created by two or more international organizations in areas where the problems they face transcend their individual competences. While these bodies may be established on the basis of a treaty concluded between international organizations (as was the case with the International Maize and Wheat Improvement Center (CIMMYT), created in 1988 by the World Bank and the UNDP; or the Vienna Institute, created in 1992 by the BIS, EBRD, IBRD, IMF, OECD and – later – the WTO), more frequently they are the result of decisions taken by the respective organizations. It is not even exceptional for the above-mentioned ‘subsidiary organs’ to act as a ‘parent organization’ for the newly created bodies. Thus, in 1994, UNICEF, UNDP, UNFPA, UNESCO, the WHO and the World Bank instituted UNAIDS (the Joint United Nations Programme on HIV/AIDS) and earlier examples include the World Food Programme (WFP, created by the FAO and the WHO in 1961), the Codex Alimentarius Commission (CAC, a 1962 FAO and WHO initiative), the International Trade Centre (WTO and UNCTAD in 1968), the Intergovernmental Panel on Climate Change (WMO and UNEP in 1998), the Joint Group of Experts in the Scientific Aspects of Marine Environmental Protection (GESAMP, created by the IMO, the FAO, UNESCO and the WMO in 1969) and the Global Environmental Facility (GEF, created by the World Bank in 1991 and joined by the UNDP and UNEP).<sup>14</sup>

***In search of regularities: Characteristics of international agencies***

Irrespective of our use of the term ‘international agencies’ for public law bodies established by international organizations, there seems to be a great deal of differentiation among the institutional designs and practices of the various agencies. The question is whether it is possible to identify some core legal features that are common to international agencies. Does the label simply refer to second generation international bodies, established by one or more international organizations? Or is it possible to distinguish a more articulated regulatory structure, based on a number of shared legal features? We attempt to answer this question by looking at some characteristics of international agencies and by making a comparison with the well researched agencies set up by the European Community. Within the scope of this study we can focus on a limited number of agencies only but we hope that this exercise will stimulate further research on this issue.

*Membership*

The membership of most international agencies is usually strictly linked to the membership of the establishing organizations. Thus, membership is normally open to all member states and other members of the ‘parent organization’. At the same time, non-governmental organizations and international organizations that are not members of the establishing institutions may usually join the international agency as observers, in accordance with the relevant provisions of the parent organization.

For example, the CAC consists of 171 member countries and only in 2003, after an amendment of the Commission’s rules of procedure, one regional organization, the EC, has become a formal member. Forty-six international organizations, 16 UN organizations and 157 non-governmental organizations participate in the CAC as observers, with the power to express their voice in the discussions of the relevant committee but without the right to vote or to move motions.<sup>15</sup> As for the World Heritage Convention, its parties are the UNESCO member states that have ratified the convention itself, while states and intergovernmental or non-governmental organizations that are not UNESCO members may either accede to the World Heritage Convention on the basis of an invitation by the General Conference of UNESCO or attend the meetings of the World Heritage Committee in an advisory capacity on the basis of a request by the General Assembly.<sup>16</sup>

*Internal structure*

International agencies usually share a structure centred around four ‘pillars’, reflecting the architecture of the parent organizations: a main collegiate body, composed of representatives of all members; an executive committee, made up of representatives of a limited number of members; several subsidiary bodies, responsible for specific tasks and usually composed of representatives of a limited number

of members; and an administrative secretariat, made up of officials serving the international agency.

An example is again provided by the CAC.<sup>17</sup> The latter is a collegiate body composed of one representative for each member of the Commission, chaired by a chairperson elected by the plenary session of the CAC and holding one regular session each year at the headquarters of either the FAO or WHO.<sup>18</sup> Given its wide composition, the CAC relies upon an executive body, called the Executive Committee, which consists of the chairperson and the vice-chairpersons of the CAC, the coordinators appointed by the CAC and seven further members elected by the CAC on a geographic basis.<sup>19</sup> Moreover, a number of subsidiary, specialized and often non-plenary bodies have been established by the CAC for the accomplishment of its task. This is the case, in particular, of the Codex Committees and the Coordinating Committees. The former, exemplified by the Codex Committee on Food Hygiene and the Codex Committee on Fats and Oils, are responsible for the preparation of draft standards for submission to the CAC and consist either of representatives of the CAC members or of representatives of selected members designated by the CAC. The latter are called to exercise coordination for regions and are composed of representatives only of CAC members belonging to the relevant region.<sup>20</sup> Finally, a secretariat composed of officers appointed by the Directors General of the FAO and WHO, housed at FAO Headquarters in Rome and funded jointly by the FAO and WHO, assist in the work of the CAC and its subsidiary bodies.

A slightly different institutional structure can be found in the World Heritage Convention, although its overall structure corresponds to that of the CAC. Thus, the General Assembly of States Parties, chaired by a chairperson elected by the Assembly itself and meeting biannually during the ordinary sessions of the General Conference of UNESCO, brings together representatives for each Party to the Convention.<sup>21</sup> The World Heritage Committee is composed of representatives of a limited number of States Parties to the Convention, elected by the General Assembly on the basis of the criterion of an 'equitable representation of the different regions and cultures of the world'.<sup>22</sup> And the World Heritage Centre is a Secretariat appointed by the UNESCO Director General and instrumental to the activities of the Committee.<sup>23</sup> In contrast to the CAC's case, however, the responsibility for the implementation of the World Heritage Convention is devoted to a set of bodies that are not brought together within a single institution provided with legal personality. Moreover, their reciprocal relationships are not clearly defined, as is illustrated by the controversy between the World Heritage Committee and the General Assembly, where the former has openly rejected the latter's attempt in the late 1990s to orientate and monitor World Heritage Committee policy, stressing that the Convention confers the substantive powers to the Committee itself, rather than to the plenary body.<sup>24</sup>

#### *Relations with member states*

Member states participate in international agencies in two main respects. To begin with, the internal offices of international agencies are composed of member states'

representatives; the main exception is the administrative secretariat, which is composed of international officials serving the international agency. All other offices have a plenary or selective transnational composition. This results in interesting dynamics: on the one hand, member states influence and condition the international agencies' decision-making procedures; on the other hand, they are in turn influenced and conditioned by the institutional contexts in which they express their voice. Because of its multilateral structure, the agency's institutional context may represent an instrument for the international agency to encourage exchange of information among national administrations, to incentivize transnational cooperation and to identify common goals and objectives. An example is provided by the CAC and its subsidiary bodies, which are collegiate bodies composed, respectively, of one representative for each member of the Commission and of one representative for each selected member state. Each representative has one vote and decisions are normally taken by a majority of the votes cast, although the CAC is called to make every effort to reach agreement on the adoption or amendment of standards by consensus.<sup>25</sup>

Member states participate not only in the internal structure but also in the administrative proceedings taking place before international agencies themselves. As a matter of fact, international regulation lays down a number of administrative proceedings that require the intervention not only of the relevant international agency, but also of national and composite administrations. Administrative proceedings involving international agencies do not usually result from the introduction of new, international layers of procedure on top of pre-existing national procedures. However, they are 'composite' administrative proceedings and may involve and integrate a number of international, national and mixed authorities. Such composite administrative proceedings allow for a different form of participation of member states in the activities of international agencies. Whereas the voice of member states is usually expressed in collegiate bodies in which several strategies may be developed, composite administrative proceedings stabilize the cooperation between a number of national, international and mixed competent authorities.

Thus, in the CAC, for example, member states not only intervene in the standard-setting procedure through their representatives within the CAC's regular session, in the stage of the final adoption of the submitted standard. They also have the possibility to comment on all aspects of a proposed draft standard, including the possible implications of the latter for their economic interests. The draft standard is then considered by the competent subsidiary body in the light of the comments made by the member states. If adopted by the Commission, moreover, the draft standard is sent to governments for further comments and then reconsidered and possibly adopted by the Commission as a 'Codex standard'.<sup>26</sup>

#### *Relations with other international institutions*

The relationship between international agencies and other global and regional institutions may differ from the one between the parent organization and other institutions. A global regulatory system can become a member of an international

agency, provided that the former is already a member of the establishing international organization. In this case, the relevant global regulatory system participates in the international agency in the same way as member states do. Most commonly, however, global regulatory systems do not become members of an international agency, but acquire the status of observer or establish other forms of cooperation that are not necessarily formalized in an agreement. In both cases, the parent organizations exercise a strict control over the relations between the established agency and other international organizations.

For example, intergovernmental organizations may attend the CAC's meetings as observers on the basis of an invitation of the Directors General of FAO or WHO, and their participation in the work of the Commission is governed by FAO and WHO regulations. And the UNDP, the UNEP and the World Bank, operating under the guidance of the Council of the GEF, can cooperate with other international organizations to promote achievement of the purposes of the GEF itself, even by making arrangements for GEF project preparation and execution.

#### *Involvement of private parties*

International agencies are public law bodies, established by international organizations and subject to public law rules.<sup>27</sup> Although some authors point to the hybrid private-public regime of some important international agencies, such as the CAC, usually the interaction of private parties does not imply any kind of hybrid nature of the international agency.<sup>28</sup> In most cases certain private parties are conferred some procedural guarantees in the administrative proceedings taking place before international agencies, to provide the latter further information and expertise. In a more limited number of cases, private parties have a formal representation within the internal structure of the relevant international agency, in particular in a collegiate body provided with advisory power.

In the case of the World Heritage Convention, for example, it is expressly provided that representatives of two non-governmental organizations, that is the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) and the International Union for Conservation of Nature and Natural Resources (IUCN), may attend the meetings of the World Heritage Committee in an advisory capacity; and representatives of other non-governmental organizations may be authorized to participate by the General Assembly. As for the CAC, a selected number of private parties, and in particular the non-governmental organizations authorized by the FAO and WHO,<sup>29</sup> may participate as observers in the standard-setting procedure: a participation that obviously should not be undervalued, but that does not allow non-governmental organizations to vote as full members.

#### *Powers and administrative law mechanisms*

Finally, international agencies tend to converge as far as their powers are concerned. Again, we see a mixed picture. The powers granted to international

agencies are often constructed either as simple coordination of member states' activities or as non-binding regulatory powers. And yet, such powers tend in practice to go well beyond mere coordination and gain a genuinely binding regulatory character.

A case in point is formed by the World Heritage Convention. On the basis of its own text, this Convention is often defined as 'a system of international cooperation and assistance designed to support States Parties in their efforts to conserve and identify the world heritage', essentially through the management of a World Heritage List and the allotment of international assistance, financed by the World Heritage Fund.<sup>30</sup> At the same time, the Operational Guidelines adopted in the 1990s and their subsequent revision and application show that inscription of a property on the List of World Heritage in Danger may take place without the request of the relevant State Party, and even against its express wishes, and may be accompanied by a number of suggested measures to be adopted by domestic authorities: an evolution which turns the World Heritage Convention from a case of international coordination to a system aimed at ensuring member states' compliance with the World Heritage regime.<sup>31</sup>

Another clear example is provided by the CAC's standards. These formally non-binding standards have gradually gained a quasi-mandatory effect through the interpretation of the SPS Agreement by the WTO Appellate Body, which has subjected the discretion of member states to deviate from international standards to very strict limitation.<sup>32</sup>

This substantial evolution of the powers of international agencies is usually accompanied by the development of administrative law mechanisms. Such mechanisms vary considerably from case to case. However, in all cases they respond to the exigency to strengthen control over the functioning and operations of international agencies through the provision of a number of administrative principles and rules applying to decision-making. Their sources include treaties and general principles of public international law. More often, however, administrative law mechanisms are established by non-treaty law-making of the parent organizations as well as of international agencies themselves, including soft law measures. As for their content, the emerging administrative law principles and rules tend to converge around decisional transparency, procedural participation and reasoned decisions, while review by a court or other independent tribunal is normally excluded. In particular, international agencies develop a practice of transparency by releasing, generally on their websites, administrative decisions, information on which they are based and material on internal decision-making. Moreover, participation in decision-making proceedings has been promoted. Notably, procedural guarantees are designed as rights of states and are granted to all member states, not only to those directly affected by regulatory decisions. Procedural guarantees are extended to civil society and private actors, although their effective role in the decision-making process is contested and their formal rights are often more limited than those granted to states.

An example of such development of administrative law mechanisms is provided by the World Heritage regime. In this case, administrative law mechanisms have

been established mainly by the Operational Guidelines, which not only impose a number of procedural duties upon member states' administrations but also establish, as far as international decision-making is concerned, procedural rules such as the publication of the application of the State Party of the reports of the Advisory Bodies and of any final decision of the World Heritage Committee.

### ***A comparison with the concept of 'agency' in European law***

In international law the term 'agency' is not very common. When it is used it is either as an alternative to 'international organization' or to refer to the 'specialized agencies' of the United Nations (which are also international organizations in their own right).<sup>33</sup> In defining 'international agencies' it may therefore be useful to relate to the notion as it has developed in European law.<sup>34</sup> The European Community in particular set up a number of agencies to be able to cope with its increasing administrative and regulatory functions. As one of the present authors observed earlier, this process revealed the emergence of a new legal model (coined 'decentralized integration'), in which the Community and its Member States jointly exercise certain supranational functions.<sup>35</sup> A European Community agency is defined by the EU as 'a body governed by European public law; it is distinct from the Community Institutions (Council, Parliament, Commission and so forth) and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task, in the framework of the European Union's 'first pillar'.<sup>36</sup> The number of EU agencies rose quite rapidly during the 1990s, in particular to unburden the European Commission. Relying on agencies to implement policies in specific technical areas would allow the Commission to focus on policy-making.<sup>37</sup> After 2000, the qualitative nature of agencies changed and some new agencies were even granted formal licensing powers and competences to investigate the enforcement of national laws.<sup>38</sup> Many of the agencies occupy a distinct position in international law.<sup>39</sup>

For this contribution in particular, it is important to note that the autonomy of the agencies has been subject to both legal and political science debates since the outset. As early as 1958, in the leading *Meroni* case, the European Court of Justice clarified the conditions under which a delegation of powers could be granted to a new entity and this case has been used as a benchmark ever since.<sup>40</sup> In its judgment the Court held that a delegating authority 'could not confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty' and that it is not possible to delegate power involving a wide margin of discretion.<sup>41</sup> Almost 50 years later, the Court referred to *Meroni* again,<sup>42</sup> which implies that – irrespective of the emergence of 'a system of increasingly powerful EU agencies',<sup>43</sup> which are often part of a national/regional/global network<sup>44</sup> – the *Meroni* doctrine is still valid.<sup>45</sup>

In the 'governance' debate the question of autonomy returned in relation to, for instance, questions of good governance and accountability<sup>46</sup> or the need to separate technical regulatory activities from politics.<sup>47</sup> In their influential work on this topic, Majone and Everson focused on regulatory agencies and defined the



‘agency’ as ‘a part of government that is generally independent in the exercise of its functions and that by law has authority to take a final and binding action affecting the rights and obligations of individuals, particularly by the characteristic procedure of rule-making and adjudication’.<sup>48</sup> At the same time, however, other research revealed that most European agencies have only instrumental – non-regulatory – powers, which puts their autonomy as well as their role in the ‘exercise of public authority’ into perspective.<sup>49</sup> Leaving aside the debate on that issue, the example of the European Union at least shows that agencies have obtained an accepted position in ‘governance beyond the state’ by international institutions.<sup>50</sup> Indeed, as held by Saurer, ‘[t]he broad establishment of EU agencies affected the organizational dimension of European administrative law in various ways’.<sup>51</sup> Along similar lines, the question raised by the present contribution is to what extent international agencies affect the organizational dimension of global administrative law. To be able to answer that question we first need to take a closer look at the autonomy of the international agencies.

## **The autonomy of international agencies**

### ***How to define the autonomy of international agencies?***

Both legal scholars and political scientists alike have regarded the idea of institutional autonomy as a key notion in the law and politics of international organizations.<sup>52</sup> Some political science and international relations theorists have claimed that viewing international organizations as ‘bureaucracies’ helps in understanding the nature of their autonomy.<sup>53</sup> The clear link between ‘autonomy’ and ‘authority’ in this approach seems to form a helpful starting point in investigating the role of international agencies. International organizations usually do much more with their authority than their creators intended and are even forced to do so. Indeed, states have created international organizations in cases where they themselves lack the necessary expertise. And it is exactly their expertise that may form a source of the authority of international agencies.<sup>54</sup> While international organizations must be autonomous actors to be able to fulfil their delegated tasks,<sup>55</sup> the assumption could be that their autonomy will only be strengthened when they use their mandate to set up international bodies that were not (explicitly) part of the original delegation.

Indeed, legal studies on this issue use a similar reasoning in defining the autonomy of international bodies.<sup>56</sup> In relation to international agencies, Martini has argued that the loss of states’ influence – and hence the autonomous position of international agencies – is reflected in at least three phenomena:<sup>57</sup> (i) the fact that the new entities emerge from the regular decisions of other organizations, rather than through the treaty-making process, compromises states’ ability to influence not only their creation but also their further development; (ii) that states may lose some powers to the parent organizations, such as the power to appoint the new entity’s executive heads; moreover, they might have to share the power to define and manage the organization’s activities; and (iii) that in the non-state-created organizations the international secretariat plays a greater role.

As we have seen, many of the established bodies may exercise functions exclusively and independently from their parent organization(s). After all, the very reason to establish an agency is that the organization wishes to 'outsource' certain technical or operational tasks.<sup>58</sup> Decision-making in these areas should then not be subject to (political) control by states. The autonomy of the agency is then related to its relative independent position (as a 'bureaucracy') from the parent organization and thus, from the member states of that organization.

### ***Measuring the autonomy of international agencies***

The next step would be to investigate to what extent our findings can tell us something about the nature or extent of the autonomy of international agencies. In line with what can be observed in relation to European agencies, the picture is, at best, mixed. The examples reveal that international agencies continue to be dependent on member states, in so far as their internal architecture has an intergovernmental or multinational nature and they operate through administrative proceedings to which national authorities are called to participate. In functional terms, irrespective of their 'bureaucratic' character, many international agencies can even be seen as mechanisms of administrative cooperation and integration among domestic authorities.

This is not to ignore that certain forms of autonomy towards member states are emerging, in particular in cases where scientific expertise plays a large role. But even there the picture is mixed. This is well illustrated by the CAC. There can be no doubt that the CAC is called to carry out functions implying a high degree of scientific expertise. However, this does not result in a characterization of the CAC as an international agency gaining an ever stronger autonomy from its members. In fact, a distinction is made within the CAC's activities between risk assessment and risk management. The former is carried out by a number of joint FAO/WHO expert bodies, which are external to the CAC itself and are composed of experts appointed by the FAO/WHO.<sup>59</sup> The latter is carried out by the CAC and by its subsidiary bodies, composed by representatives of the CAC's members. The relation between the two sides of the coin is obviously a complex one. However, the balance that is sought by the distinction between risk assessment and risk management cannot be said to have the effect of reducing the role of member states within the CAC and enhancing the autonomy of the CAC as a scientific, impartial international body. Rather, the effect is that of combining administrative trans-nationalism with a qualitatively different point of view, expressed by the 'a-national' language of science.<sup>60</sup>

As far as their autonomy from the parent organization is concerned, it is also difficult to draw general conclusions. In most cases, international agencies are subject to several powers of the parent organizations. Such powers vary from case to case and tend to escape generalization. The establishing organizations are usually granted powers such as giving an opinion on international agencies' working programmes, the appointment of one or more 'representatives' of the parent organizations themselves in the international agencies' internal bodies and

the power of producing a shortlist of names for the director of an agency. For example, the Director General of UNESCO appoints the secretariat which assists the World Heritage Committee, prepares the Committee's documentation and the agenda of its meetings, and has the responsibility for the implementation of its decisions.<sup>61</sup> In a similar vein, the functioning of the CAC is influenced in several regards by the Directors General of the FAO and WHO: they prepare the provisional agenda for each session of the CAC, convene the sessions of subsidiary bodies, appoint from the staffs of their organizations a secretary of the Commission and other officials and bring the CAC's recommendations having policy or financial implications for the FAO or WHO to the attention of the governing bodies of the FAO or WHO for appropriate action.

The relationships between international agencies and other global regulatory regimes are also relevant. Their participation in global regulatory networks allows international agencies to expand their sphere of influence. In this perspective, international agencies are not only a mechanism further to deepen relations among their member states and between their member states and a number of international organizations; they are also an instrument to widen the scope of the effects of the common action of the parent organizations in the global administrative space.

In conclusion, the strong links which exist between an international agency and the parent organization, on the one hand, and the member states, on the other, may put the autonomy of such agencies into perspective. At the same time, international agencies have developed as international entities with a distinct place and role in the global administrative space. Ironically, it may very well be their pivotal position in the global regulatory network – with tentacles that reach within domestic legal orders as well as towards global and regional institutions – that allowed them to affect the organizational dimension of the phenomenon of global administrative law (see above).

### **Conclusion: Consequences of the emergence of international agencies for the development of the global administrative space**

Our tentative analysis so far has shown that international agencies are gradually emerging as a relatively homogenous organizational and functional phenomenon. In that sense they can be positioned within the wider framework of the 'global administrative space'. Which organizational tendencies at the global level do they reflect? And which tendencies do they reject?

International agencies – as mechanisms functionally oriented to foster 'horizontal' and/or 'vertical' administrative integration – fully conform to the idea of a development of mixed or composite administrations in the global legal space. As observed by several global administrative law studies, global and national administrations are not two distinct and separate sets of bodies. Rather, they may be seen as two interlinked 'levels', communicating in at least two principal ways: through a thick web of mixed collegiate bodies, established at the global level but

composed of national representatives;<sup>62</sup> and through more complex 'common systems' composed of national, mixed and global administrative bodies. This dual movement of both 'vertical' and 'horizontal' administrative integration in the global legal space has a functional explanation. It allows for both the reinforcement of global public powers and the safeguarding of member states' prerogatives. On the one hand, global composite organizations allow and structure dialogue among global regulatory systems and domestic administrations. On the other hand, they grant member states the possibility to participate in global decision-making processes.

The participation of private actors in many international agencies also has an effect upon the nature of the 'global administrative space'. As we have seen, private actors participate in the functioning of a global public body through the exercise of certain procedural guarantees in the relevant administrative proceedings, as well as through formal representation in collegiate offices of certain international agencies. This situation is rather common in the global administrative space. Quite often, in fact, the internal organization of global public bodies is designed in such a way as also to give voice to private parties. Modalities of participation obviously vary from case to case. However, the role of private actors is often limited to the exercise of non-binding advisory powers or to that of simple observers. For example, representatives of non-governmental organizations may attend the meetings of the General Assembly of the International Civil Defence Organization on the basis of an invitation of the latter and without the right to vote.<sup>63</sup>

International agencies may also be considered as specific governance structures reflecting certain general tendencies of development of the global administrative space as far as the establishment of administrative law mechanisms is concerned. As has been observed, over time, international agencies have been made subject to certain administrative law mechanisms. Such mechanisms are envisaged by traditional public international law sources as well as non-treaty law-making, including soft law measures. And they tend to converge around decisional transparency, procedural participation and reasoned decisions, while review by a court or other independent tribunal is normally excluded. The core of this emerging body of law is constituted by procedural rights that are provided to member states. Even private actors are granted certain procedural rights, but they are often more limited than those granted to states.

In conclusion, our analysis leads to the following observations. First, in spite of the great deal of differentiation among their institutional designs and practices, international agencies tend to share, at their current state of development, certain common organizational and functional features. In particular, international agencies may be seen as governance structures aiming, on the one hand, at deepening cooperation among different global regulatory systems and/or among the latter and their member states in specific sectors, even through measures that make member states' discretion subject to very strict limitation; on the other hand, aiming at widening the sphere of influence of their parent organizations.

Secondly, international agencies reveal certain aspects of the development of the global administrative space: the development of mixed administrations, linking

‘vertically’ global and national administrations and ‘horizontally’ different global administrations by sector; the process of involvement of private actors in the exercise of global administrative functions; and the strengthening of internal checks and administrative controls over global institutions. A striking feature in this respect is that – in contrast to the agencies we know at the national and EU level – international agencies are quite often established by two or more international organizations, rather than by one administration.

To return to our initial question: it seems clear that international agencies have occupied a position within the global administrative space, but – similar to their counterparts in EU administrative law – a mixed picture emerges when one looks at their autonomy. While their authority (often based on technical expertise) allows the agencies to operate at a certain distance from their parent organization, the participation of the member states in the agencies and the clear links with national bodies may put any ‘supranational’ features into perspective. Nevertheless, the international agencies form a good example of the blurring of borders between national, regional and global normative, regulatory and administrative processes.<sup>64</sup>

## Notes

- 1 See for instance N. Krisch and B. Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’, *European Journal of International Law*, 2006, vol. 17, 1–13, at 1; and K. Jayasuriya, ‘Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance’, *Indiana Journal of Global Legal Studies*, 1999, vol. 6, 425–55.
- 2 We are here using the concept of global administrative law in the sense in which the latter has been developed by Sabino Cassese, Richard B. Stewart and Benedict Kingsbury. Sabino Cassese has observed that many international regimes actually present the distinguishing features of administrative law (features that are partly typical of the national experience, partly peculiar) and has explained such phenomena in terms of the development of a ‘global administrative law’ (‘even though this qualification may seem unacceptable to those who believe that administrative law cannot be global by definition. Some believe that administrative law is always domestic par excellence and that if it is global, then it cannot be administrative law, since global law concerns the relations between states’; S. Cassese, ‘Administrative Law Without the State? The Challenge of Global Regulation’, *New York University Journal of International Law and Politics*, 2006, vol. 37, 663–94, 669–70). Richard B. Stewart and Benedict Kingsbury, moving from the observation of the existence of a ‘global administrative space’, have defined global administrative law as the set of the ‘legal mechanisms, principles, and practices, along with supporting social understandings, that promote or otherwise affect the *accountability* of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make’; see B. Kingsbury, N. Krisch, R. B. Stewart and J. B. Wiener, ‘Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law’, *Law and Contemporary Problems*, 2005, vol. 68, 1–13, 5. For an overall synthesis of the main results of the two research projects, see the monographic issues of the *European Journal of International Law* (2006, vol. 17(1)) and *Law and Contemporary Problems* (2005, vol. 68(3) & (4)), dedicated, respectively, to *Global Governance and Global Administrative Law in the International Legal Order* and to *The Emergence of Global*

- Administrative Law*; see also the monographic issue of the *New York University Journal of International Law and Politics* (2006, vol. 37(4)).
- 3 N. M. Blokker and H. G. Schermers (eds), *Proliferation of International Organizations*, The Hague: Kluwer Law International, 2001.
  - 4 See the early study by C. Shanks, H. K. Jacobson and J. H. Kaplan, 'Inertia and Change in the Constellation of International Governmental Organizations, 1981–1992', *International Organization*, 1996, vol. 50, 593.
  - 5 Cf. also C. Tietje, 'Global Governance and Inter-Agency Cooperation in International Economic Law', *Journal of World Trade*, 2002, vol. 36, 501.
  - 6 On the different dimensions of the relationship between states and international organizations cf. D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, Oxford: Oxford University Press, 2005.
  - 7 C. Martini, 'States' Control over New International Organization', *Global Jurist Advances*, 2006, vol. 6, 1–25, at 25. The term 'new international organization' is used to point to the emergence of – what she calls – 'second-order international organizations'.
  - 8 In his book *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005) José Alvarez reveals that the role of international organizations in law-making not only increased but also that international law is not always well enough equipped to handle this development. Cf. also D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, Oxford: Oxford University Press, 2005. See earlier in particular J. Delbrück (ed.), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest*, Berlin: Ducker & Humblot, 1996. The interdependence between normative processes at different levels of national and international government has been coined 'multilevel regulation' by one of the present authors: R. A. Wessel and J. Wouters, 'The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres', in A. Føllesdal, R. A. Wessel and J. Wouters (eds), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes*, Leiden, Boston: Martinus Nijhoff Publishers, 2008, pp. 9–47.
  - 9 In the law of international organizations the view is still held that international organizations should be based on an international agreement. Cf. H. J. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity*, 4th edn, Leiden: Martinus Nijhoff Publishers, 2003; J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn, Cambridge: Cambridge University Press, 2009.
  - 10 See D. Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs', *British Yearbook of International Law*, 1997, vol. 67, 413–78; and S. Torres Bernardez, 'Subsidiary Organs', in R. J. Dupuy (ed.), *Manuel sur les Organisations Internationales – A Handbook on International Organizations*, Dordrecht: Martinus Nijhoff Publishers, 1998, 109–53.
  - 11 P. Szasz, 'The Complexification of the United Nations System', *Max Planck Yearbook of United Nations Law*, 1999, vol. 3, 1–57.
  - 12 Examples include the Commission on Phytosanitary Measures (created by the FAO in 1997) and the Prototype Carbon Fund (instituted by the World Bank in 1997). See Martini, op. cit., at 4–5.
  - 13 See on this nature of the Committee: C. Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?', *German Law Journal*, 2008, vol. 9, 1513–38.
  - 14 See Martini, op. cit., for a more extensive analysis. Most examples used in this section are drawn from her survey. See on the interesting example of the GEF also L. Boisson de Chazournes, 'The Global Environment Facility Galaxy: On Linkages among Institutions', *Max Planck Yearbook of United Nations Law*, 1999, vol. 3, 243–82; and E. Hey, 'Exercising Delegated Public Power', in R. Wolfrum and V. Röeben (eds), *Developments of International Law in Treaty Making*, Berlin: Springer, 2006, pp. 437–62.

- 15 Articles 2–4 of the Statutes of the Codex Alimentarius Commission; see also Rules I, II and IX of the Rules of Procedure of the Codex Alimentarius Commission available at: <http://www.fao.org>.
- 16 Articles 8 and 31–32 of the Convention Concerning the Protection of the World Cultural and Natural Heritage.
- 17 For a general description of the structure of the Codex see, inter alia, D. G. Victor, *Effective Multilateral Regulation of Industrial Activity: Institutions for Policing and Adjusting Binding and Nonbinding Legal Commitments*, Cambridge, MA: Massachusetts Institute of Technology, 1998, Chapter 6.
- 18 See Rules III and VI/1 and 4 of the Rules of Procedure of the Codex Alimentarius Commission.
- 19 Rule V of the Rules of Procedure of the Codex Alimentarius Commission.
- 20 Article 7 of the Statutes of the Codex Alimentarius Commission; see also Rule XI of the Rules of Procedure of the Codex Alimentarius Commission.
- 21 Article 8 of the Convention Concerning the Protection of the World Cultural and Natural Heritage; see also the General Assembly Rules of Procedure available at: <http://whc.unesco.org/en/garules> (last accessed 21 June 2010).
- 22 Article 8, op. cit.; see also the Committee Rules of Procedure available at: <http://whc.unesco.org/pg.cfm?cid=223> (last accessed 24 June 2010).
- 23 Article 14 of the Convention Concerning the Protection of the World Cultural and Natural Heritage.
- 24 On this point see D. Zacharias, ‘The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution’, in *German Law Journal*, 2008, vol. 9, 1833–64, 1842.
- 25 Rules VI and X of the Rules of Procedure of the Codex Alimentarius Commission.
- 26 Procedures for the Elaboration of Codex Standards and Related Texts available at: <http://www.fao.org> (last accessed 24 June 2010).
- 27 This leaves out other relevant bodies, which have been said to perform ‘public law’ functions, but have a strong ‘non-governmental’ origin, such as the World Anti-Doping Agency (WADA) or the Internet Corporation for Assigned Names and Numbers (ICANN). See on these bodies recently L. Casini, ‘Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (Wada)’, *International Organizations Law Review*, 2009, vol. 6, 421–46; and D. Lindsay, *International Domain Name Law. ICANN and the UDRP*, Oxford: Hart, 2007.
- 28 See on this point B. Kingsbury, N. Krisch and R. B. Stewart, *The Emergence of Global Administrative Law*, op. cit., p. 22. For a different view, see A. Herwig, *Transnational Governance Regimes for Foods Derived from Bio-Technology and their Legitimacy*, in C. Joerges, I. Sand and G. Teubner (eds), *Transnational Governance and Constitutionalism*, Oxford: Hart, 2004, p. 199 ff.
- 29 See, in addition, for examples of public-private partnerships involving the WHO: G. L. Burci, ‘Public/Private Partnerships in the Public Health Sector’, *International Organizations Law Review*, 2009, vol. 6, 359–82.
- 30 Article 7 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, op. cit.
- 31 On this evolution see in particular S. Battini, *Amministrazioni nazionali e controversie globali*, Milano, Giuffrè, 2007, p. 95 ff.
- 32 For an account of this evolution, see R. A. Pereira, ‘Why Would International Administrative Activity be any Less Legitimate? – A Study of the Codex Alimentarius Commission’, *German Law Journal*, 2008, vol. 9, 1693–718, 1703 ff.; D. Bevilacqua, ‘Il principio di trasparenza come strumento di accountability nella Codex Alimentarius Commission’, *Rivista trimestrale di diritto pubblico*, 2007, vol. 57, 651–80, 657. In general terms, see S. Cassese, ‘Global Standards for National Administrative Procedure’, *Law and Contemporary Problems*, 2005, vol. 68, 109–26, 117–18.
- 33 Cf. E. Luard, *International Agencies: The Emerging Framework of Interdependence*, London, Basingstoke: MacMillan Press, 1977 (1985).

- 34 At present, the European Community has established an impressive number of agencies: the Community Fisheries Control Agency (CFCA); the Community Plant Variety Office (CPVO); the European Agency for Safety and Health at Work (EU-OSHA); the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX); the European Aviation Safety Agency (EASA); the European Centre for Disease Prevention and Control (ECDC); the European Centre for the Development of Vocational Training (Cedefop); the European Chemicals Agency (ECHA); the European Environment Agency (EEA); the European Food Safety Authority (EFSA); the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND); the European GNSS Supervisory Authority (GSA); the European Institute for Gender Equality (under preparation); the European Maritime Safety Agency (EMSA); the European Medicines Agency (EMA); the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA); the European Network and Information Security Agency (ENISA); the European Railway Agency (ERA); the European Training Foundation (ETF); the European Union Agency for Fundamental Rights (FRA); the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM); and the Translation Centre for the Bodies of the European Union (CdT). Agencies have also been set up in the more intergovernmental pillars of the Union. Thus, in the area of the Union's foreign and security policy, the European Defence Agency (EDA), the Institute for Security Studies (ISS) and the European Union Satellite Centre (EUSS) were created. Similarly, in the area of the Union's police and judicial cooperation in criminal matters, the European Police College (CEPOL), the European Police Office (Europol) and the European Union's Judicial Cooperation Unit (Eurojust) have been set up. See inter alia G. Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union', *European Institute of Public Administration*, 1997; E. Vos, 'Reforming the European Commission: What Role to Play for the European Agencies?', *Common Market Law Review*, 2000, vol. 37, 1113–34; P. Craig, *EU Administrative Law*, Oxford: Oxford University Press, 2006, pp. 148–50; E. Chiti, 'The Emergence of a Community Administration: the Case of European Agencies', *Common Market Law Review*, 2000, vol. 37, 309–43; and E. Chiti, 'An important part of the EU's institutional machinery. Features, problems and perspectives of European agencies', *Common Market Law Review*, 2009, vol. 46, 1395–442.
- 35 E. Chiti, 'Decentralised Integration as a New Model of Joint Exercise of Community Functions? A Legal Analysis of European Agencies', *ARENA Working Papers*, WP 02/31, 2002. See also S. Cassese, 'European Administrative Proceedings', *Law & Contemporary Problems*, 2004, vol. 68, 21–36, 22, who identified the agencies as 'decentralized administration [...] characterized by parallel, non-exclusive legal powers vested in both the Community and the Member States, together with a single administrative apparatus [...]'.  
 36 As the Commission itself argued: 'The creation of further autonomous EU regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union. Such agencies should be granted the power to take individual decisions in application of regulatory measures. They should operate with a degree of independence and within a clear framework established by the legislator'. See [http://europa.eu/agencies/community\\_agencies/index\\_en.htm](http://europa.eu/agencies/community_agencies/index_en.htm) (last accessed 24 June 2010).
- 37 See the informative contribution by J. Saurer, 'The Accountability of Supranational Administration: The Case of European Union Agencies', *American University International Law Review*, 2009, vol. 24, 429–88, at 444.
- 38 Commission White Paper on European Governance, COM(2001) 428 final, 25 July 2001.
- 39 See G. Schusterschitz, 'European Agencies as Subjects of International Law', *International Organizations Law Review*, 2004, vol. 1, 163–88.
- 40 Cf. R. H. van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in D. M. Curtin and R. A. Wessel (eds),



*Good Governance and the European Union: Reflections on Concepts, Institutions, and Substance*, Antwerpen: Intersentia, 2005, pp. 20–48.

- 41 Case 10/56, *Meroni & Co v High Authority of the ECSC* [1958] ECR 53, at paras 171 and 173.
- 42 Joined Cases C–154/04 and C–155/04, *The Queen v Secretary of State for Health* [2005] ECR I–6451; and Case C–301/02, *Tralli v European Central Bank* [2005] ECR I–4071. Cf. also D. Curtin, ‘Holding (Quasi-) Autonomous EU Administrative Actors to Public Account’, *European Law Journal*, 2007, vol. 13, 523–41.
- 43 Saurer, *op. cit.*, 435.
- 44 See the various contributions to Føllesdal, Wessel and Wouters, *op. cit.* This network is also composed of other ‘public governance arrangements’. See for an interesting example: E. Hey, ‘Multi-Dimensional Public Governance Arrangements for the Protection of the Transboundary Aquatic Environment in the European Union: The Changing Interplay between European and Public International Law’, *International Organizations Law Review*, 2009, vol. 6, 191–223.
- 45 As was also acknowledged by the European Commission in its 2008 Communication *European Agencies – The Way Forward*, COM(2008) 135 final, at 5: ‘there are clear and strict limits to the autonomous power of regulatory agencies’. Note, however, that there are good reasons to argue that the setting up of Community bodies does not necessarily imply a delegation of powers, which may put the relevance of the *Meroni* doctrine into perspective. More extensively: E. Chiti, ‘Beyond *Meroni*: the Community Legitimacy of the Provisions Establishing the European Agencies’, in G. Della Cananea (ed.), *European Regulatory Agencies*, Paris: ISUPE Press, 2004, p. 80.
- 46 Cf. D. Curtin, ‘Mind the Gap: The Evolving EU Executive and the Constitution’, in W. Devroe and D. Droschout (eds), *Wouter van Gerven Lectures*, No 3, Groningen: Europa Law Publishing, 2004; and Saurer, *op. cit.* See also M. Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’, *European Law Journal*, 2009, vol. 15, 599–615, who argues that the *de facto* level of autonomy displayed by some European agencies is below the autonomy provided by the formal legal rules as a result of ongoing controls exercised by one (or other) of the principals.
- 47 See for instance G. Majone and M. Everson, ‘Institutional Reform: Independent Agencies, Oversight, Co-ordination and Procedural Control’, in O. De Schutter, N. Lebessis and J. Paterson (eds), *Governance in the European Union*, Luxembourg: Office for Official Publications of the European Communities, 2001, pp. 129–68.
- 48 *Ibid.*, p. 129.
- 49 See, for example, E. Chiti, ‘Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies’, *European Law Journal*, 2004, vol. 10, 402–38.
- 50 The term ‘the exercise of international public authority’ is borrowed from Von Bogdandy *et al.*, who define ‘authority’ as the legal capacity to *determine* others and to reduce their freedom, ie to unilaterally shape their legal or factual situation. An exercise is the realization of that capacity, in particular by the production of standard instruments such as decisions and regulations, but also the dissemination of information, like rankings. The determination may or may not be legally binding. [...] We consider as international public authority any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest’. A. Von Bogdandy, P. Dann and M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, *German Law Journal*, 2008, vol. 10, 1375–400, at 1381–82, 1383.
- 51 Saurer, *op. cit.*, 452.
- 52 See the contributions in Part 1 and 2 of this book.
- 53 M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics*, Ithaca, London: Cornell University Press, 2004, p. 3 (emphasis added).

- 54 Ibid., p. 24. A similar line of reasoning may be found in I. Venzke, 'International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law', *German Law Journal*, 2008, vol. 10, 1401–28.
- 55 Barnett and Finnemore, *ibid.*, p. 22.
- 56 See also the contributions in Part 1 of this book.
- 57 Martini, *op.cit.*, 24.
- 58 See on 'technical bodies' also W. Edeson, 'The Role of Technical Bodies', in R. Wolfrum and V. Röeben, *op. cit.*, pp. 63–92.
- 59 Such bodies are the Joint Meetings of the FAO Panel of Experts on Pesticide Residues in Food and the Environment, the WHO Core Assessment Group on Pesticide Residues (JMPR), and the Joint FAO/WHO Expert Committee on Food Additives (JECFA).
- 60 The importance of administrative evaluation in the overall process is stressed by D. Bevilacqua, 'The Codex Alimentarius Commission and its Influence on European and National Food Policy', *European Food and Feed Law Review*, 2006, vol. 1, 1 ff., 8–9, where it is argued that '[t]he activity of CAC is formally scientific but factually discretionary and political'.
- 61 Article 14 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, *cit.*
- 62 A classification of global committees is provided by H. G. Schermers and N. M. Blokker, *International Institutional Law*, *op. cit.*, p. 293 ff.; see also M. Savino, 'The Role of Transnational Committees in the European and Global Orders', *Global Jurist Advances*, 2006, Issue 3, Article 5 available at: <http://www.bepress.com/gj/advances/vol6/iss3/art5> (last accessed 24 June 2010).
- 63 On the exercise of global administrative functions by private parties – often recognized as a distinguishing feature of the global administrative space – see for example Kingsbury, Krisch and Stewart, *op. cit.*, 22–23.
- 64 Cf. Follesdal, Wessel and Wouters, *op. cit.*; and J. Nijmann and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law*, Oxford: Oxford University Press, 2007.